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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 PHIL MCKIBBEN,

11 Plaintiff,

12 v.

13 SNOHOMISH COUNTY,

14 Defendant.

CASE NO. C13-1293JLR

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

15 **I. INTRODUCTION**

16 The matter comes before the court on the parties' cross motions for summary
17 judgment. (*See* Plf. Mot. (Dkt. # 20); Def. Mot. (Dkt. # 23).) This case arises from
18 Plaintiff Phil McKibben's attempts to open an adult cabaret. Mr. McKibben argues that
19 Defendant Snohomish County's ("County") zoning restrictions on adult entertainment
20 violate the First Amendment. Having considered the submissions of the parties, the
21 balance of the record, and the relevant law, and having heard oral argument, the court
22

1 DENIES Mr. McKibben's motion for summary judgment and GRANTS the County's
2 motion for summary judgment.

3 II. BACKGROUND

4 The following facts are undisputed. In 1994, the County established an Adult
5 Entertainment Zoning Committee ("Committee") to study the community effects of adult
6 entertainment venues. (Lubrin Decl. (Dkt. # 28) ¶¶ 2-7; Comm. Rep. (Dkt. # 28-1).) The
7 Committee reviewed studies of the secondary effects of adult entertainment, ordinances
8 from other jurisdictions, and federal and state court decisions; heard testimony from law
9 enforcement officers and community members; held a public hearing; and authored a
10 final report. (See Comm. Rep.; Olson Decl. (Dkt. # 21) Ex. 7 ("Meeting Minutes"); 1996
11 Ordinance (Dkt. # 28-2); Olson Decl. Ex. 17 (transcript of Council proceedings).) In
12 1996, the County enacted the following zoning requirements pursuant to the
13 recommendation of the Committee. (See 1996 Ordinance.)

14 First, adult entertainment businesses may only be located on parcels zoned for
15 light industrial, heavy industrial, or industrial park use. Snohomish County Code
16 ("SCC") § 30.22.100. Second, adult entertainment businesses must be dispersed a
17 minimum distance from "any public or private school, preschool, educational institution,
18 church or other religious facility, public or private park, youth oriented facility,
19 establishment serving alcohol by the drink," or other parcel whose zoning does not permit
20 adult entertainment use. SCC § 30.28.015. For adult entertainment dance studios, such
21 as Mr. McKibben's proposed adult cabaret, the minimum dispersion distance is 660 feet.

22 *Id.*

1 In August 2011, Mr. McKibben filed an application for a license to operate an
2 adult cabaret at 10809 Mukilteo Speedway in unincorporated Snohomish County.
3 (Lubrin Decl. ¶ 11, Application (Dkt. # 28-3).) The County denied Mr. McKibben's
4 application because the proposed cabaret was located within 660 feet of two restaurants
5 that served alcohol by the drink. (Denial (Dkt. # 28-4); *see also* Lubrin Decl. ¶ 11.) Mr.
6 McKibben was previously a part owner of the only live adult entertainment venue to
7 operate in the unincorporated County within the last 30 years. (Lubrin Decl. ¶ 8; Def.
8 Mot. at 5.) This venue closed in 2012 amid allegations by the federal government that
9 the dancers were engaging in acts of prostitution and illegal dancing. (Lubrin Decl. ¶ 8;
10 Plea Agreement (Dkt. # 27-1) ¶ 4.)

11 To date, Mr. McKibben's 2011 application is only the second application for a live
12 adult entertainment venue that the unincorporated County has received since 1994.
13 (Lubrin Decl. ¶¶ 9-10.) The County, which stretches from Puget Sound to the Cascade
14 Mountains, comprises 68% forest land, 18% rural land, 5% agricultural land, and only
15 9% urban or city development. (2013 Annual Rep. (Dkt. # 34-1).) The majority of the
16 population lives in incorporated cities within the County. (*Id.*)

17 Upon denial of his application, Mr. McKibben filed this action, alleging that the
18 County's zoning restrictions regarding adult entertainment dance studios violate his First
19 Amendment rights. (*See generally* Compl. (Dkt. # 1).) Both parties now move for
20 summary judgment in their favor. (*See* Pfl. Mot.; Def. Mot.)
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III. ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where the moving party demonstrates (1) the absence of a genuine issue of material fact and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the moving party does not bear the ultimate burden of persuasion at trial, it can show the absence of an issue of material fact in two ways: (1) by producing evidence negating an essential element of the nonmoving party's case, or, (2) by showing that the nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party will bear the ultimate burden of persuasion at trial, it must establish a prima facie showing in support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1994). That is, the moving party must present evidence that, if uncontroverted at trial, would entitle it to prevail on that issue. *Id.* at 1473.

If the moving party meets its burden of production, the burden then shifts to the nonmoving party to identify specific facts from which a factfinder could reasonably find in the nonmoving party's favor. *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In determining whether the factfinder could reasonably find in the nonmoving party's favor, "the court must draw all reasonable inferences in

1 favor of the nonmoving party, and it may not make credibility determinations or weigh
2 the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).
3 When adjudicating cross-motions for summary judgment, a court “evaluate[s] each
4 motion separately, giving the nonmoving party in each instance the benefit of all
5 reasonable inferences.” *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 790-91
6 (9th Cir. 2006).

7 **B. First Amendment Law**

8 Erotic dancing is protected expression under the First Amendment. *Kev, Inc. v.*
9 *Kitsap Cnty.*, 793 F.2d 1053, 1058 (9th Cir. 1986). The constitutionality of the County’s
10 zoning regulations is determined by a three-step framework. *City of L.A. v. Alameda*
11 *Books, Inc.*, 535 U.S. 425, 433-34 (2002) (plurality) (citing *City of Renton v. Playtime*
12 *Theatres, Inc.*, 475 U.S. 41, 50 (1986).) The first inquiry is whether the provision is a
13 complete ban on protected expression or whether it can properly be analyzed as a time,
14 place, and manner regulation of speech. *Id.*; *see also Tollis, Inc. v. Cnty. of San Diego*,
15 505 F.3d 935, 939 (9th Cir. 2007). Here, the County’s ordinance does not ban adult
16 entertainment altogether, but rather permits such venues as long as they are distanced
17 from certain sensitive locations. *See* SSC § 30.22.100; SCC § 30.28.015. As such, the
18 ordinance is a time, place, and manner restriction. *See Alameda Books*, 535 U.S. at 433-
19 34 (plurality).

20 The second inquiry is whether the provision is content-based, thus meriting strict
21 scrutiny, or effectively content-neutral, thus meriting intermediate scrutiny. *Id.*; *Tollis*,
22 505 F.3d at 939. A provision is effectively content-neutral if it is aimed at controlling

1 only the secondary effects of live adult entertainment businesses, rather than the content
2 of expression practiced therein. *Alameda Books*, 535 U.S. at 433-34 (plurality); *World*
3 *Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1191 (9th Cir. 2004). Here,
4 as established by the Committee's final report, the purpose of the County's ordinance is
5 to minimize the negative secondary community effects—such as increased crime rates,
6 declining property values, neighborhood blight, and the exposure of minors to adult
7 entertainment—associated with live adult entertainment businesses. (Comm. Rep. at 10-
8 12.) Accordingly, the County's ordinance is content-neutral. *See Alameda Books*, 535
9 U.S. at 433-34 (plurality).

10 Because the County's ordinance is content-neutral, the third inquiry is whether the
11 ordinance meets intermediate scrutiny. *See id.*; *Tollis*, 505 F.3d at 939. An ordinance
12 satisfies intermediate scrutiny if it is designed to serve a substantial government interest,
13 is narrowly tailored to serve that interest, and reasonable alternative avenues of
14 communication remain available. *Alameda Books*, 535 U.S. at 433-34 (plurality); *World*
15 *Wide Video of Wash.*, 368 F.3d at 1191 (quoting *Center for Fair Pub. Policy v. Maricopa*
16 *Cnty.*, 336 F.3d 1153, 1166 (9th Cir. 2003)). Mr. McKibben raises two challenges to the
17 County's ordinance: (1) that the requirement that adult entertainment dance studios be
18 dispersed 660 feet from establishments serving alcohol by the drink is not designed to
19 serve a substantial government interest, and (2) that the zoning restrictions as a whole do
20 not afford reasonable alternative avenues of communication for exotic dancing. (*See*
21 *Mot.*) The court addresses each argument in turn below.

1. Designed to serve a substantial government interest

When enacting a secondary effects ordinance, a municipality “must rely on evidence that demonstrates a connection between the speech regulated and the secondary effects that motivated adoption of the ordinance.” *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1001 (9th Cir. 2007) (quoting *Alameda Books*, 535 U.S. at 441 (plurality)) (internal punctuation omitted). The Supreme Court has “refused to set . . . a high bar for municipalities that want to address merely the secondary effects of protected speech.” *Alameda Books*, 535 U.S. at 438-39 (plurality). Accordingly, a municipality can rely on any evidence that is “reasonably believed to be relevant” for demonstrating a connection between the regulated speech and the asserted government interest. *Fantasyland Video*, 505 F.3d at 1001 (quoting *Alameda Books*, 535 U.S. at 438 (plurality)). Moreover, “very little evidence is required.” *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring).¹

Under this standard, a municipality is not required to come forward with empirical data in support of its rationale. *Maricopa Cnty.*, 336 F.3d at 1168. The Supreme Court has found that a requirement for empirical evidence “would go too far in undermining [the] settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech.” *Alameda Books*, 535 U.S. at 439 (plurality). As such, a municipality is entitled to rely on

¹ Because Justice Kennedy’s concurrence was the narrowest opinion joining the Supreme Court’s fractured disposition in *Alameda Books*, to the extent the concurrence departs from the plurality opinion, the concurrence controls. See *World Wide Video of Wash.*, 368 F.3d at 1193 (citing *Marks v. United States*, 430 U.S. 188, 193).

1 anecdotal or testimonial evidence. *See World Wide Video of Wash.*, 368 F.3d at 1194-95,
2 1197-98; *Maricopa Cnty.*, 336 F.3d at 1168. Similarly, a municipality need not perform
3 its own studies into secondary effects; rather, “[r]eliance on the experiences of other
4 jurisdictions is sufficient to satisfy the [municipality’s] minimal burden at the legislative
5 stage.” *Id.* at 1003 (citing *City of Renton*, 475 U.S. at 50-52); *see also City of Erie v.*
6 *Pap’s A.M.*, 529 U.S. 277, 296-97 (2000).

7 Of course, a municipality may not merely “assert that it will reduce secondary
8 effects by reducing speech in the same proportion.” *Alameda Books*, 535 U.S. at 449
9 (Kennedy, J., concurring). And although the bar for showing a substantial government
10 interest is low, that “is not to say that a municipality can get away with shoddy data or
11 reasoning.” *Id.* at 438. Rather, a “municipality’s evidence must fairly support its
12 rationale for its ordinance.” *Id.*

13 If a municipality’s evidence “fairly supports” its rationale, the burden shifts to the
14 plaintiff to “cast direct doubt on this rationale, either by demonstrating that the
15 municipality’s evidence does not support its rationale, or by furnishing evidence that
16 disputes the municipality’s factual findings.” *Id.* at 438-39. Such evidence must be
17 “actual and convincing.” *Fantasyland Video*, 505 F.3d at 1001 (quoting *Alameda Books*,
18 535 U.S. at 438-39 (plurality)). If a plaintiff succeeds in casting doubt on a
19 municipality’s rationale, the burden shifts back to the municipality to supplement the
20 record with evidence renewing support for a theory that justifies its ordinance. *Alameda*
21 *Books*, 535 U.S. at 438-39 (plurality); *World Wide Video of Wash.*, 368 F.3d at 1195.
22

1 The County identified the following secondary effects that the ordinance was
2 targeted to reduce: increased crime, decreased property values, neighborhood blight, and
3 the exposure of minors to adult entertainment. (Comm. Rep. at 3, 9-11.) It is beyond
4 dispute that a government's interest in curbing such secondary effects is substantial. *See*
5 *Maricopa Cnty.*, 336 F.3d at 1166 ("It is beyond peradventure at this point in the
6 development of the doctrine that a state's interest in curbing the secondary effects
7 associated with adult entertainment establishments is substantial."). Additionally, Mr.
8 McKibben concedes that the County relied on sufficient evidence supporting the
9 dispersal requirements as applied to residential zones and other areas where children are
10 likely to congregate, namely "any public or private school, preschool, educational
11 institution, church or other religious facility, public or private park, [or] youth oriented
12 facility." (*See* Mot. at 10 n.26.) As such, the only question before the court is whether, at
13 the legislative stage, the County met its initial burden to connect the dispersal
14 requirement regarding "any establishment serving alcohol by the drink" to the identified
15 secondary effects of increased crime, decreased property values, neighborhood blight,
16 and exposure of minors to adult entertainment.

17 The court finds that the County met its burden. The County established the Adult
18 Entertainment Zoning Committee to study the community effects of adult entertainment
19 and to recommend proposed zoning ordinances seeking to reduce those effects while
20 ensuring adequate opportunities to operate adult entertainment businesses. (*See* Lubrin
21 Decl. ¶¶ 2-7; Comm. Rep.) The Committee held at least ten meetings; reviewed studies
22 of the secondary effects of adult entertainment, sample ordinances from other

1 jurisdictions, and federal and state court decisions; heard testimony from law
2 enforcement officers and community members regarding the effects of adult
3 entertainment businesses; held a public hearing; and authored a final report proposing
4 certain regulations of adult businesses. (*See* Comm. Rep.; Meeting Minutes; 1996
5 Ordinance; Olson Decl. Ex. 17 (transcript of Council proceedings).)

6 In 1996, the Council adopted the Committee's recommended regulations. (*See*
7 1996 Ordinance.) With respect to the dispersion requirement, the Committee's report
8 states:

9 In addition, the Committee heard testimony from law enforcement officers
10 regarding the problems associated with the combination of adult
11 entertainment uses and alcohol. Two primary issues were identified. The
12 first was that alcohol and adult entertainment do not mix well. The potential
13 for disruptive, dangerous, and/or illegal behavior is increased when alcohol
14 is involved with adult entertainment. In Washington State adult
entertainment facilities do not serve alcohol, and the Committee was
concerned to keep separation between alcohol and adult entertainment uses.
In particular the Committee was concerned regarding the movement of
patrons between taverns, bars, and other establishments that sell alcohol
and adult entertainment uses.

15 (Comm. Rep. at 13.)

16 The Committee's report continues:

17 This movement was related to the second issue. Law enforcement officers
18 indicated that problems had been experienced when patrons and employees
19 of adult entertainment establishments went to nearby places that served
20 alcohol. Restaurants with a largely family orientation felt their business
21 was hurt when this occurred, especially when solicitation for acts of
prostitution took place. This concern matched the focus of the Committee
on protecting families and children from exposure to adult entertainment.
For these reasons the Committee recommended that buffers listed above
also be applied to any establishment selling alcohol.

22 (*Id.*)

1 David Gossett, the legislative analyst who drafted the initial version of the report,
2 testifies:

3 Businesses wanted to stop the flow of customers between the restaurants
4 and the clubs in both directions. In other words, to stop people from getting
5 drunk and going to the clubs, and to stop customers and employees
(including exotic dancers) from leaving the clubs and going to the
restaurants.

6 (Gosset Decl. (Dkt. # 24) ¶ 4 (emphasis omitted).) He also testifies that “the [C]ommittee
7 had been told, frankly, by representatives of law enforcement that alcohol tended to
8 create additional legal problems with live adult entertainment.” (2d Olson Decl. (Dkt.
9 # 32) Ex. 6 (“Gosset Dep.”) at 45:5-9.)

10 In addition to testimonial evidence, the Committee relied on the regulations and
11 report of the nearby City of Everett. (Gosset Decl. ¶ 7; Olson Decl. Ex. 10 (list of
12 ordinances on which the Committee relied); Ex. 11 (“Everett Code”) at 45).) The Everett
13 zoning code requires adult use businesses to be set back 500 feet from “any existing
14 establishment selling alcoholic beverages for consumption on premises.” (Everett Code
15 at 45.) The Everett report summarized testimony by Sergeant John Stewart: “Most
16 illegal activity related to live adult entertainment establishments have [sic] involved
17 persons who have been intoxicated.” (Everet Rep. Excerpts (Dkt. # 24-2).) The Everett
18 report also summarized testimony by Sergeant Joe Beline: “Increased street prostitution
19 occurs in the vicinity of live adult entertainment businesses.” (*Id.*)

20 Testimony by local law enforcement officers and business owners, as well as the
21 report and ordinance of a nearby jurisdiction, all constitute evidence “reasonably believed
22 to be relevant” to problem at hand. *See Fantasyland Video*, 505 F.3d at 1001; *Alameda*

1 *Books*, 535 U.S. at 438. This testimony adequately demonstrates a connection between
2 the speech regulated (namely, live adult entertainment near establishments that serve
3 alcohol) and the secondary effects of increased crime rates, decline of property value, and
4 exposure of minors to adult entertainment. *See Fantasyland Video*, 505 F.3d at 1001;
5 *Alameda Books*, 535 U.S. at 438. Specifically, the testimony supports the County’s
6 concern that service of alcohol at nearby establishments exacerbates the disruptive and
7 illegal behavior associated with live adult entertainment, and, because alcohol cannot be
8 served inside the adult entertainment facility, facilitates the intrusion of adult
9 entertainment employees and customers into family-oriented businesses and otherwise
10 encourages the mingling of adult entertainment employees and customers with vulnerable
11 segments of the population. (*See Comm. Rep.* at 13.)

12 “The record here is hardly overwhelming, but it does not have to be.” *Maricopa*
13 *Cnty.*, 336 F.3d at 1168 (citing *Alameda Books*, 535 U.S. at 451 (Kennedy, J.,
14 concurring) (stating that “very little evidence is required” to justify a secondary effects
15 ordinance)). Both the Supreme Court and the Ninth Circuit have upheld ordinances
16 supported by similar evidence. *See, e.g., World Wide Video of Wash.*, 368 F.3d at 1196
17 (upholding ordinance because the plaintiff failed to rebut public testimony regarding the
18 adverse effects of retail-only adult entertainment stores); *Maricopa Cnty.*, 336 F.3d at
19 1168 (upholding ordinance supported by citizen testimony at public hearings and
20 documentary studies); *Alameda Books*, 535 U.S. at 452 (upholding proposition
21 “supported by a single study and common experience”) (Kennedy J., concurring). As
22 such, the County has carried its initial burden to show that its rationale for the dispersion

1 requirement from establishments that serve alcohol is “fairly supported.” *See Alameda*
2 *Books*, 535 U.S. at 438-39 (plurality).

3 The burden then shifts to Mr. McKibben to “cast direct doubt on this rationale,
4 either by demonstrating that the municipality’s evidence does not support its rationale, or
5 by furnishing evidence that disputes the municipality’s factual findings.” *See id.* Mr.
6 McKibben fails to carry this burden. First, Mr. McKibben’s reliance on out-of-circuit
7 cases to argue that the County’s testimonial evidence is insufficient is misplaced. (*See*
8 *Plf. Mot.* at 17-19.) The Supreme Court has explicitly rejected the contention that a
9 municipality must come forward with empirical data in support of its rationale. *See*
10 *Alameda Books*, 535 U.S. at 439 (plurality). “To succeed in ‘casting doubt’ on a city’s
11 evidence or rationale, a plaintiff must do more than point to a municipality’s lack of
12 empirical evidence, or challenge the methodology of the municipality’s evidence.”
13 *Alameda Books, Inc. v. City of L.A.*, 631 F.3d 1031, 1042 (9th Cir. 2011) (citing *Gammoh*
14 *v. City of La Habra*, 395 F.3d 1114, 1126–27 (9th Cir. 2005) and *Maricopa Cnty.*, 336
15 F.3d at 1168).

16 Second, Mr. McKibben fails to provide any “actual and convincing” evidence in
17 his favor. *See Fantasyland Video*, 505 F.3d at 1001 (quoting *Alameda Books*, 535 U.S. at
18 438-39 (plurality)). Mr. McKibben contends that the County must not really have
19 considered law enforcement officer testimony because the Committee’s meeting minutes
20 do not describe an instance in which a law enforcement officer discussed alcohol in the
21 context of adult entertainment. (*See, e.g., Plf. Reply* (Dkt. # 36) at 3.) Mr. McKibben’s
22 attempt to cast doubt on the Committee’s report falls short. The meeting minutes

1 describe at least two times that law enforcement officers addressed the Committee, as
2 well as at least two times that the Committee discussed the alcohol disbursement
3 requirement, and, as such, the minutes are consistent with the findings stated in the
4 report. (*See* Meeting Minutes at 8, 10-12, 15, 21.) Moreover, there is no indication that
5 the meeting minutes were intended to be exhaustive: each hour and a half meeting is
6 summarized in approximately one to three pages of minutes. (*See generally id.*) Mr.
7 McKibben provides no explanation or authority showing why the court should find that
8 the informal meeting minutes trump the Committee's official report.

9 Mr. McKibben's argument that there is an inadequate connection between the
10 dispersion requirement and the identified secondary effects because the ordinance does
11 not also include establishments (such as liquor stores) that sell alcohol for private
12 consumption is unavailing. Municipalities are entitled to a reasonable opportunity to
13 experiment with solutions to address the secondary effects of protected speech. *See*
14 *Alameda Books*, 535 U.S. at 439 (plurality). Mr. McKibben's belief that there is a more
15 effective way to address certain identified secondary effects does not render the solution
16 chosen by the County unconstitutional.

17 Finally, Mr. McKibben's argument that there is an inadequate connection between
18 the dispersion requirement and secondary effects because the ordinance includes non-
19 family establishments (such as pubs) falls short. This over-breadth critique implicates the
20 narrow tailoring requirement. To meet the narrow tailoring requirement, a time, place, or
21 manner regulation need not be the least restrictive means of serving a municipality's
22 content neutral interests. *See Fantasyland Video*, 505 F.3d at 1004. To the contrary, the

1 narrow tailoring requirement “is satisfied so long as the regulation promotes a substantial
2 government interest that would be achieved less effectively absent the regulation and the
3 means chosen are not substantially broader than necessary to achieve the government’s
4 interest.” *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989)).
5 Here, the County’s goals of decreasing illegal behavior and the diffusion of adult
6 entertainment workers and clients into nearby community establishments would be
7 achieved less effectively absent the dispersion requirement, and the dispersion
8 requirement is not substantially broader than necessary to achieve these goals. *See*
9 *United States v. Albertini*, 472 U.S. 675, 689 (1985) (holding that restrictions will not
10 violate the First Amendment “simply because there is some imaginable alternative that
11 might be less burdensome on speech”). As such, the dispersion requirement meets the
12 narrow tailoring requirement.

13 In sum, the County originally relied on sufficient evidence to support its
14 dispersion requirement and Mr. McKibben has failed to carry his burden to “cast direct
15 doubt” on the County’s rationale. *See Alameda Books*, 535 U.S. at 438-39 (plurality). As
16 such, the County’s dispersion requirement adequately advances a substantial government
17 interest.

18 **2. Reasonable alternative avenues of communication**

19 An ordinance satisfactorily allows alternative avenues of communication as long
20 as “it offers adult businesses a ‘reasonable opportunity to open and operate within the
21 city.’” *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000) (quoting *City of*
22 *Renton*, 475 U.S. at 54). Courts apply a two-step approach to determining whether this

1 condition is satisfied: (1) determine the number of sites reasonably available to adult
2 businesses under the regulation at issue, and (2) determine whether that number affords a
3 sufficient number of potential location sites for adult businesses. *Id.*; *see also Topanga*
4 *Press, Inc. v. City of L.A.*, 989 F.2d 1524, 1530 (9th Cir. 1993). The burden of proving
5 alternative avenues of communication rests on the municipality. *Lim*, 217 F.3d at 1054.
6 “What constitutes a reasonable opportunity to open and operate an adult theater is a
7 mixed question of fact and law.” *Young v. City of Simi Valley*, 216 F.3d 807, 817 (9th
8 Cir. 2000); *see also Lim*, 217 F.3d at 1054 (“A mixed question of law and fact exists
9 when there is no dispute as to the facts, the rule of law is undisputed, and the question is
10 whether the facts satisfy the legal rule.”)

11 **a. Alternative sites available**

12 With respect to the first step, the initial burden falls on the municipality to provide
13 a good faith and reasonable list of potentially available property. *See id.*; *Isbell v. City of*
14 *San Diego*, 258 F.3d 1108, 1114 (9th Cir. 2001). Upon such a showing, the burden shifts
15 to the plaintiff to show that particular sites would in fact not reasonably become
16 available. *Lim*, 217 F.3d at 1054. For sites to be available, they must be in the “actual
17 business real estate market.” *Isbell*, 258 F.3d at 1114 (quoting *Lim*, 217 F.3d at 1055). It
18 is irrelevant, however, whether a given site “will result in lost profits, higher overhead
19 costs, or even prove to be commercially infeasible for an adult business.” *Id.* (citing
20 *Topanga Press*, 989 F.2d at 1531). Rather, “[t]he issue is whether any site is part of an
21 actual market for commercial enterprises generally.” *Topanga Press*, 989 F.2d at 1531;
22 *see also City of Renton*, 475 U.S. at 54.

1 The following considerations are relevant to determining whether a site is part of
 2 the relevant market for commercial enterprises. First, available sites must satisfy the
 3 zoning restrictions at issue. *Isbell*, 258 F.3d at 1113. Beyond that, sites that are
 4 commercially zoned are automatically part of the relevant market. *Topanga Press*, 989
 5 F.2d at 1531. The mere fact that a municipality has restricted adult entertainment venues
 6 to industrial zones does not render the sites unavailable under *City of Renton*. See *Tollis*,
 7 505 F.3d at 942 (“If an industrial site is reasonably accessible and has sufficient
 8 infrastructure to be ‘available’ under *Topanga*, it remains available even if its use for
 9 other commercial purposes may be restricted by the zoning law.”) Sites located in
 10 industrial or manufacturing zones, however, must be “reasonably accessible to the
 11 general public,” have “proper infrastructure,” and must be suitable for “some generic
 12 commercial enterprise, although not [necessarily] every commercial enterprise.” *Tollis*,
 13 505 F.3d at 941 (quoting *Topanga Press*, 989 F.2d at 1531). Furthermore, sites for which
 14 it is “unreasonable to believe that [they] would ever become available to any commercial
 15 enterprise” are not part of the market. *Topanga Press*, 989 F.2d at 1531.

16 Here, the parties agree that a total of 301 parcels in unincorporated Snohomish
 17 County meet the zoning requirements for an adult cabaret—namely, the parcels are zoned
 18 for light industrial, heavy industrial, or industrial park use, and some or all of each parcel
 19 is set outside the dispersion zone.² (See Garrelts Rep. (Dkt. # 29-1) at 3; Fear Rep. (Dkt.
 20 # 25-1) at 2.) Of those 301 parcels, the County’s expert identifies 104 parcels that in his

21
 22 ² The dispersion requirement is measured from the corner of an adult entertainment building to
 the nearest border of the parcel it must be separated from. See SCC § 30.28.015(2).

1 opinion are part of the actual business real estate market. (*See* Fear Rep. Ex. B (“Fear
 2 Sprdsht.”).) Because this list contains pertinent and specific information about each
 3 parcel and excludes obviously inappropriate parcels such as landfills, state parks, and
 4 United States Department of Navy government facilities, the court finds that this list is a
 5 good faith and reasonable list of potentially available property. *See Lim*, 217 F.3d at
 6 1054; *Isbell*, 258 F.3d at 1114. As such, the burden shifts to Mr. McKibben to show that
 7 particular sites are in fact not reasonably available. *Id.*

8 Mr. McKibben’s expert concedes for the purposes of this motion that 16 parcels
 9 are reasonably available, but identifies 88 parcels that in his opinion are not reasonably
 10 available. (*See* Garrelts Rep.; Garrelts Sprdsht.³) The expert groups these parcels
 11 according to the reasons he believes they are unavailable. The court addresses each
 12 group of parcels in turn. *See Fantasyland Video, Inc. v. Cnty. of San Diego*, 373 F. Supp.
 13 2d 1094, 1143 (S.D. Cal. 2005) (addressing disputed parcels one by one) *aff’d in part*,
 14 *rev’d in unrelated part and remanded sub nom. Tollis, Inc. v. Cnty. of San Diego*, 505
 15 F.3d 935 (9th Cir. 2007) and *aff’d*, 505 F.3d 996 (9th Cir. 2007).

16 **i. Parcels with only a portion of property outside the dispersal area**

17 Mr. McKibben argues that parcels ## 1, 3-6, 8, 10-16, and 22-24 are not part of
 18 the relevant commercial real estate market because the portion of the property located
 19 outside the dispersal area consists of inadequate space to locate a cabaret while meeting
 20 requirements for setback, parking, and landscaping. (Garrelts Sprdsht. at 1; 2d Garrelts

21 ³ This exhibit was provided to the clerk’s office in hardcopy form and, as such, is not listed on the
 22 docket.

1 Decl. (Dkt. # 31) ¶ 4.) Mr. Garrelts testifies that, in his experience, the “minimum size”
2 for an adult cabaret is 2400 square feet. (2d. Garrelts Decl. ¶ 3.) Be that as it may, the
3 relevant inquiry is not whether a location suits the particular needs of adult cabarets, but
4 rather whether the location is suitable for some commercial business. *See Topanga*
5 *Press*, 989 F.2d at 1531 (“While it is constitutionally irrelevant whether relocation sites
6 located in industrial or manufacturing zones suit the *particular* needs of an adult
7 business, potential sites must be reasonable relocation sites for some commercial
8 enterprise before they can be considered part of the relevant market.”); *see also Tollis*,
9 505 F.3d at 941 (stating that available property must be suitable for “some generic
10 commercial enterprise, although not [necessarily] every commercial enterprise”). The
11 County’s expert demonstrates how a sizeable building can be erected on each of parcels 1
12 and 3-6. (*See* Fear Rep. at 4-5, Exs. B, C (maps showing possible placement of buildings
13 on parcels)). Mr. McKibben does not argue that such buildings are inadequate for other
14 commercial enterprises besides a cabaret, such as, for example, a coffee shop.
15 Consequently, he has failed to carry his burden to show that these parcels are not a part of
16 the relevant market.

17 With respect to the remaining parcels, Mr. McKibben contends that, due to
18 existing structures, only a “sliver of land” for a new cabaret building is available. (Plf.
19 Resp. (Dkt. # 30) at 5.) The County points out that the existing structures can be
20 removed and that as a result the parcels would then contain ample room for parking and a
21 commercial business. (Fear Sprdsht at 1.) Mr. McKibben provides no authority to
22 support the position that property is excluded from the commercial market if it contains

existing structures that are unsuitable for use as a cabaret. (*See* Plf. Resp. at 5-6.) There may be a cost associated with removing existing structures, but it is well-established that “possible economic impact upon a business is not a factor to be considered by the courts when determining whether a city has provided a business with a reasonable alternate location.” *Topanga Press*, 989 F.2d at 1529. When determining whether a site is part of the relevant market, “it is not relevant whether [the] site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business.” *Id.* at 1531. The only issue “is whether any site is part of an actual market for commercial enterprises generally.” *Id.*

Mr. McKibben has provided no evidence that the properties are unsuitable for commercial enterprises generally. *See Tollis*, 505 F.3d at 941. As such, he has not carried his burden to show that the majority of these properties are not a part of the relevant real estate market. The sole exception is parcel # 15: there is at least a question of fact as to whether the County’s proffered solution of adjusting the property line would transform that property into a reasonable alternative. *See Levi v. City of Ontario*, 44 F. Supp. 2d 1042, 1050 (C.D. Cal. 1999) (holding that the possibility of subdivision to satisfy zoning requirements did not render a site part of the relevant market).

ii. Parcels with restrictions on commercial use

Mr. McKibben argues that parcels ## 9 and 18 should be excluded from the market because they are encumbered with contractual restrictions on commercial use. (Garrelts Sprdsht. at 1.) First, there is evidence that parcel # 18 is only accessible via an easement that is limited to residential use. (2d. Garrelts Decl. Ex. 4 (easement).) Second,

1 parcel # 9 is subject to an open space taxation agreement that limits the commercial
2 development of the land. (Garrelts Decl. Ex. 3 (open space agreement).) The agreement
3 remains in force for at least 3 more years and can last indefinitely if the owner does not
4 withdraw. (*Id.*) The court finds that Mr. McKibben has raised a question of fact
5 regarding the commercial availability of all these two parcels.

6 **iii. Parcels lacking infrastructure**

7 Mr. McKibben argues that parcels ## 26-28 are not a part of the relevant
8 commercial market because they lack appropriate infrastructure and because parcel # 28
9 is landlocked. The Ninth Circuit has explained that examples of necessary infrastructure
10 may include “sidewalks, roads and lighting.” *Topanga Press*, 989 F.2d at 1531.
11 Additionally, landlocked sites are generally not considered available because they are not
12 reasonably accessible to the general public. *See Fantasyland Video*, 373 F. Supp. 2d at
13 1138 (citing *Isbell*, 258 F.3d at 1113; *Lim*, 217 F.3d at 1055). Merely asserting that sites
14 lack proper infrastructure, however, is insufficient; a plaintiff must show that such sites
15 are unusable for any generic commercial enterprise. *Diamond v. City of Taft*, 215 F.3d
16 1052, 1056 (9th Cir. 2000). Here, Mr. McKibben states that the parcels lack access to
17 water, sewer, lighting, and sidewalks, and are located over 1000 feet from power and
18 roads. (Garrelts Rep. at 11; Garrelts Sprdsht at 1.) The County admits that the parcels
19 are designated as “forestland,” *see generally* RCW ch. 84.33, and are not in the vicinity
20 of sidewalks or streetlights. (Def. Resp. (Dkt. # 23) at 16.) The County nonetheless
21 maintains that the “rural character” of Snohomish County often requires business
22 ventures to install new infrastructure. *Id.* The County’s expert recalls one business

owner, in particular, “who was undeterred by the lack of a sewer and arranged for sewage to be stored on site and removed regularly.” (Fears Rep. at 5.)

The County presents no other evidence regarding the feasibility of such endeavors, and its position that business ventures are “often” required to install new infrastructure is belied by the fact that only 3 of the 301 industrial parcels identified for this case lack infrastructure. (*See* Fears Sprdsht.) Moreover, in arguing that parcel # 28 is not landlocked, the County mistakes an abandoned railroad converted into a trail for a road. (*See* 2d. Garrelts Decl. ¶ 6, Ex. 5.) The court finds Mr. McKibben has at least raised a question of fact regarding the suitability of these parcels for the general commercial real estate market. *See Fanstasyland Video*, 373 F. Supp. 2d at 1136 (“While neither side presented sufficient evidence to prevail on their respective cross-motions, the Court finds each side presented sufficient evidence to successfully oppose the other’s summary judgment motion. Accordingly, a disputed issue of fact remains whether one site in Area 2 . . . could be developed.”).

iv. Parcels near or under water

Mr. McKibben argues that parcels ## 30-32 are unsuited for any generic commercial enterprise because they are swamps or tidelands. (*See* Fears Sprdsht. at 2.) The County responds that these parcels are “very usable” because they not in a flood plain. (*Id.*) Mr. McKibben’s rejoinder is that these parcels are unsuitable because they have been developed as pulp mills, used for logging, or contain sloughs for the transport of logs. (*Id.*) The Ninth Circuit has stated that examples of sites unsuited for any generic commercial enterprise include swamps and land under the ocean. *See Topanga Press*,

1 989 F.2d at 1531. Accordingly, the court finds that Mr. McKibben has raised an issue of
2 fact regarding the reasonable availability of these three parcels.

3 **v. Parcels on airport land**

4 Mr. McKibben argues that every parcel located at Paine Field, also known as
5 Snohomish County Airport, should be excluded from the market. (Garrelts Sprdsht. at 3-
6 8; Plf. Resp. at 7.) The County agrees that runways, taxiways, and locations immediately
7 adjacent thereto should be excluded because they are reserved by the Federal Aviation
8 Administration for aviation uses only.⁴ (Def. Resp. at 9; Fear Rep. at 6.) The property at
9 Paine Field, however, also includes office parks and buildings that are available for lease
10 by non-aviation businesses. (Fear Rep. at 6.) For example, the current airport tenant list
11 includes non-aviation businesses such as a mini-blind store, a lighting design company, a
12 hotel, a machine shop, and a rental management company. (Fears Rep. at 6, Ex. D
13 (airport tenant list).) Additionally, the property at Paine Field includes vacant parcels
14 that the “Airport Master Plan” designates for “airport compatible industrial
15 development.” (*See, e.g.*, Fears Sprdsht. at 5.)

16 In general, any commercial venture must obtain permission from the airport
17 director in order to locate in Paine Field.⁵ (2d. Olson Decl. (Dkt. # 35) Ex. 2 (“Dolan
18 Dep.”) at 19:1-20:11.) The airport director, who is a County employee, has the discretion

19
20 ⁴ Consequently, only the following parcels at Paine Field are disputed: 91, 94-97, 99-101, 103-
21 105, 108-110, 112, 115-118, 152, 153, 156, 162-169, 173-175, 191-194, 220, 229, 240, 241, 247-251,
22 254, 264-266. (*See* Fears Sprdsht. at 3-7.)

⁵ Snohomish County Code 15.08.400 requires consent from the airport manager before beginning
commercial operations at the airport. *See* SCC § 15.08.400. This requirement is perpetuated in a lease
clause that requires airport consent for subleases. (*See* Dolan Dep. at 19:1-20:11.)

1 and authority to decide whether to allow a business to site in the airport. (*Id.*) The
2 airport director usually collaborates with airport staff members when making siting
3 decisions; they consider the Airport Master Plan and the County’s “vision for how areas
4 will develop.” (*Id.* at 8:10-9:3.) In general, the Snohomish County Code provides that
5 the airport may deny lease applications for the following reasons: (1) proposed uses that
6 are incompatible with the airport master plan, area zoning or federal restrictions incurred
7 with grants; (2) airport safety concerns; (3) unavailability of space; (4) budget
8 constraints; or (5) ecological considerations. *See* SCC § 15.08.420-25. The deputy
9 airport director testified that he does not “have a strong feeling . . . one way or the other”
10 as to whether a cabaret would ultimately be permitted at Paine Field, but noted that a
11 restaurant and lounge had operated at the airport for many years. (Dolan Dep. at 20:12-
12 21:22.) As an example of a lease application that might be rejected, the airport deputy
13 director referenced an application for a marijuana growing operation that would conflict
14 with federal law and Federal Aviation Agency regulations. (*Id.* at 18:16-25.)

15 Mr. McKibben does not dispute that some Paine Field property is available for
16 lease by general commercial businesses. (*See* Plf. Resp. at 7.) Instead, he contends that
17 even these areas must be excluded from the market because the airport director is vested
18 with discretion to decide which lease applications to grant and, as such, “you cannot
19 locate an adult cabaret there as a matter of right.” (*Id.*) This argument is not viable.

20 The relevant marketplace is not limited to property in which an adult cabaret is
21 guaranteed location “as a matter of right.” After all, most if not all property owners
22 maintain some amount of discretion regarding which businesses they choose to lease to.

1 Here, there is no indication that the airport director would categorically exclude adult
 2 entertainment businesses. But even if there were, the Ninth Circuit has made clear that
 3 parcels that prohibit leases to adult entertainment venues are considered part of the
 4 relevant market so long as they are available to commercial businesses generally. *See*
 5 *Lim*, 217 F.3d at 1055. Consequently, the mere fact that every commercial business
 6 seeking to operate at Paine Field does so subject to the airport manager's discretion does
 7 not, without more, remove Paine Field property from the general business real estate
 8 market.⁶ *See City of Renton*, 475 U.S. at 54 ("That respondents must fend for themselves

11 ⁶ Mr. McKibben also appears to contend that the airport director's discretion to approve lease
 12 applications constitutes a prior restraint on free speech. Mr. McKibben, however, is not entitled to bring a
 13 facial challenge to this policy. Although facial challenges may lie where a law gives a government
 14 official substantial power to discriminate based on the content of speech, "[t]his is not to say that the press
 15 or a speaker may challenge as censorship any law involving discretion to which it is subject." *City of*
 16 *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988). Rather, "[t]he law must have a close
 17 enough nexus to expression, or to conduct commonly associated with expression, to pose a real and
 18 substantial threat of the identified censorship risks." *Id.* Accordingly, in the Ninth Circuit, "a facial
 19 challenge is proper only if the statute by its terms seeks to regulate spoken words or patently expressive or
 20 communicative conduct, such as picketing or handbilling, . . . or if the statute significantly restricts
 21 opportunities for expression." *S. Or. Barter Fair v. Jackson Cnty.*, 372 F.3d 1128, 1135 (9th Cir. 2004)
 22 (citations omitted); *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022,
 1032 (9th Cir. 2006) (holding that a facial challenge to an ordinance regarding distribution of food in city
 parks was not available). The Supreme Court has identified building permits as an example of "laws of
 general application that are not aimed at conduct commonly associated with expression" and therefore
 "carry with them little danger of censorship." *City of Lakewood*, 486 U.S. at 760-61. Although
 occasional opportunities for censorship via building permit exist, the permitting system provides "too
 blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.*

Here, the County's policy regarding airport lease applications does not seek to regulate spoken
 words or patently communicative conduct. *See S. Or. Barter Fair*, 372 F.3d at 1135. Rather, it is a law
 of general application that is aimed at conduct not commonly associated with expression—namely, the
 conduct of obtaining commercial leases of retail space. *See City of Lakewood*, 486 U.S. 760. Although,
 as with building permits, occasional opportunities for censorship may exist, these situations are better
 addressed in the context of actual allegations of misuse. *See id.* at 761. Mr. McKibben raises no
 allegations of actual misuse, and otherwise puts forth no evidence showing that the discretionary leasing
 policy is being unconstitutionally applied to adult entertainment venues. As such, his prior restraint
 challenge fails.

1 in the real estate market, on an equal footing with other prospective purchasers and
 2 lessees, does not give rise to a First Amendment violation.”).

3 To the extent that parcels at Paine Field are not limited to aviation use or aviation-
 4 related businesses, the court finds that Mr. McKibben fails to show that these parcels are
 5 not a part of the relevant real estate market. The one exception is parcel # 191, which is
 6 apparently slated for “aviation use development w/ taxi access.” (*See* Fears Sprdsht. at
 7 6.) Due to testimony that parcels with access to taxiways are typically reserved for
 8 aviation businesses, as well as the fact that the County concedes that all other parcels
 9 labeled “aviation use development w/ taxi access” are outside the relevant real estate
 10 market, the court finds that a question of fact exists as to the status of this parcel. (*See*
 11 *id.*; Fears Rep. at 6.)

12 **vi. Parcels unsuitable for generic commercial enterprises**

13 Mr. McKibben argues that parcels ## 240, 241, 247-251, 254, and 264-266 have
 14 been developed in a way that is incompatible with any generic commercial enterprise.
 15 (Garrelts Sprdsht at 9-10.) These parcels include gravel pits, recycling sites, and large
 16 warehouses, and some of the parcels are landlocked. (*Id.*) The County argues that these
 17 sites are not “totally incompatible” with a generic commercial business because they
 18 could be renovated by demolishing existing buildings or subdividing the property. (Def.
 19 Resp. at 10.) The Ninth Circuit, however, has stated that examples of sites unsuited for
 20 generic commercial enterprise include warehouses, sewage treatment plants, and sports
 21 stadiums. *Topanga Press*, 989 F.2d at 1531. Additionally, the possibility of subdividing
 22 does not necessarily transform an unacceptable site into a reasonable alternative. *See*

1 *Levi*, 44 F. Supp. 2d at 1050. The problem with the County’s argument is that, although
 2 it is of course theoretically possible to demolish a sport stadium or a large warehouse in
 3 order to develop a cabaret, the cost of doing so may be so prohibitive as to make the
 4 proposition unrealistic. *See Topanga Press*, 989 F.2d at 1530; *see also Lim*, 217 F.3d at
 5 1055 (“[S]ingle-use buildings, like warehouses and factories, may arguably be outside
 6 commercial real estate market.”) (quoting *Woodall v. City of El Paso*, 49 F.3d 1120,
 7 1125-26 (5th Cir. 1995)). Mr. McKibben has at least raised an issue of fact as to whether
 8 it is reasonable to believe these 11 parcels “would ever become available to any
 9 commercial enterprise.” *See id.* at 1531.

10 **vii. Parcels with long-term commitments**

11 Finally, Mr. McKibben argues that parcels ## 267, 268, and 270-281 are not part
 12 of the relevant commercial market because they are subject to long term leases, in
 13 receivership, or not currently for sale by their owner. (Garrelts Sprdsht. at 9.) *City of*
 14 *Renton* only requires a site to be potentially—rather than actually—available. *See City of*
 15 *Renton*, 475 U.S. at 53. As such, the mere fact that a site is currently occupied or not
 16 currently for sale or lease does not render it unavailable. *See id.* at 53-54; *Diamond*, 215
 17 F.3d at 1056 (“Despite the current unavailability of these sites, [the plaintiff] did not offer
 18 sufficient evidence to show that these sites would not reasonably become available to any
 19 commercial enterprise.”). Nonetheless, the requirement of potentiality connotes “genuine
 20 possibility.” *See Topanga Press*, 989 F.2d at 1531. Accordingly, long term leases may
 21 exclude sites from the commercial market. *Lim*, 217 F.3d at 1055. A plaintiff must,
 22 however, provide evidence regarding the length of an allegedly “long term” lease.

1 *Isbell*, 258 F.3d at 1113 (rejecting expert opinion that did not specify the length of the
2 leases in question).

3 Here, Mr. McKibben presents evidence showing that the leases on parcels ## 268,
4 270, and 272 run for the next 14, 7, and 11 years, respectively. (Garrelts Sprdsht. at 9;
5 2d. Garrelts Decl. ¶ 8.) As such, these properties are not available within the meaning of
6 *City of Renton*. See *Lim*, 217 F.3d at 1055. With respect to parcels ## 271, 273, 277-
7 279, Mr. McKibben avers that there is a “long-term lease” in place for each but provides
8 no evidence as to the length of those leases. (See Garrelts Sprdsht. at 9.) As such, under
9 *Isbell*, Mr. McKibben fails to show these parcels are unavailable. See *Isbell*, 258 F.3d at
10 1113. The same holds true for parcels ## 267 and 281, because although the owners
11 informed Mr. McKibben’s expert that the property was currently not for sale, there is no
12 indication regarding how far into the future their intentions not to sell extend, and current
13 occupancy alone is not grounds for unavailability under *City of Renton*. See *City of*
14 *Renton*, 475 U.S. at 53-54; *Diamond*, 215 F.3d at 1056; (see also Garrelts Sprdsht. at 9;
15 2d. Garrelts Decl. ¶ 8.) Last, Mr. McKibben excludes parcels ## 274 through 276
16 because they are in receivership and a sale is pending. (Garrelts Sprdsth. at 9.) These
17 properties contain multiple commercial spaces, and Mr. McKibben provides no reason to
18 believe those spaces will not be available for lease or purchase from the new owners. For
19 these reasons, the court finds that Mr. McKibben has shown only that parcels ## 268,
20 270, and 272 are unavailable due to long-term leases.

viii. Summary

In sum, Mr. McKibben has shown that 3 of the County's identified 104 properties are not part of the relevant commercial market and has raised questions of fact for 21 other properties.⁷ For the purposes of evaluating the sufficiency of the available sites, the court will take all inferences in Mr. McKibben's favor. *See A.C.L.U. of Nevada*, 466 F.3d at 790-91. Accordingly, the court will judge the sufficiency of the sites on the assumption that the County's ordinance provides only 80 locations for adult cabarets.

b. Sufficiency of available sites

"There is no constitutional requirement that a city make available a certain number of sites." *Diamond v. City of Taft*, 215 F.3d at 1056-57. Instead, to determine whether the potentially available sites provide an adult business a "reasonable opportunity to open and operate" in a particular municipality, a court must "perform a fact-specific inquiry" that takes into account the "particular characteristics of [the municipality], including its size and make-up." *Young*, 216 F.3d at 821. Supply and demand is one factor that a court should consider. *Id.*; *Tollis*, 505 F.3d at 942. Other factors include "the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, community needs, the incidence of adult businesses in other comparable communities, and the goals of the city plan." *Young*, 216 F.3d at 821. No one factor is dispositive. *Id.* at 822.

⁷ Specifically, Mr. McKibben has shown that parcels ## 268, 270, and 272 are unavailable, and that there are questions of fact regarding parcels ## 9, 15, 18, 26-28, 30-32, 191, 240, 241, 247-251, 254, 264-266.

i. Percentage of available acreage

Starting with the percentage of available acreage, the total acreage of the 80 available locations is 336 acres.⁸ The parties disagree, however, whether the relevant comparison is between the available sites and the total acreage of the unincorporated area, or the total acreage that would potentially be available to adult entertainment businesses if it were not for the zoning ordinance. Specifically, Mr. McKibben maintains that the relevant comparison is to the “total usable land” area in unincorporated Snohomish County, which he calculates as the total land area minus incorporated cities, county and federal forest lands, and the Tulalip Indian Reservation. (Garrelts Rep. at 9.) The “total usable land” is therefore 307,528.6 acres. (*Id.*) For its part, the County maintains that the denominator should be the “total commercial land” area in unincorporated Snohomish County, which it calculates as the sum of the properties with “Urban Industrial” and “Urban Commercial” designations under the Snohomish County 2025 Comprehensive Plan. (Fear Rep. at 5.) These designations include land zoned for a variety of uses, such as neighborhood business, general commercial, business park, and light and heavy industry, but exclude residential, rural, and agricultural land, among

⁸ Mr. McKibben argues that court should use the “total buildable acreage” rather than the total acreage of these properties. (Plf. Resp. at 2-3.) Mr. McKibben appears to have arrived at the concept of “total buildable acreage” by observing the column on the County’s expert’s spreadsheet that calculated, for some parcels of land, the amount of land that was available for new construction. (*See* Fears. Sprdsht.) This value, however, was not calculated for all parcels of land—for example, the value is irrelevant to parcels with existing buildings for lease. Moreover, Mr. McKibben cites no authority for his assertion that the acreage of available land should be limited to the footprints of the new buildings that could be built on the land. As such, the court will use the total acreage of the parcels in the general commercial real estate market.

1 others. (*See* County Plan (Dkt. # 34-3).) The “total commercial land” is 4,787 acres.
2 (Fear Rep. at 5.)

3 Whereas *Young* states the pertinent factor is “the percentage of available acreage
4 theoretically available to adult businesses,” it does not specify what areas of land the
5 percentage should compare. *See* 216 F.3d at 822. In *Walnut Properties* and *City of*
6 *Renton*, the courts relied on the acreage of the entire municipality. *See Walnut*
7 *Properties*, 861 F.2d at 1108; *City of Renton*, 475 U.S. at 53. Neither court, however,
8 discussed its choice of denominator or addressed the issue currently before the court.
9 Ultimately, the purpose of the comparison is to determine whether adult entertainment
10 stores have a “reasonable opportunity to open and operate” in a given municipality. *See*
11 *Young*, 216 F.3d at 821. The focal point of this inquiry is the effect that the
12 municipality’s ordinance has on the “actual business real estate market” in which generic
13 commercial enterprises actually operate. *See Isbell*, 258 F.3d at 1112-13; *Topanga*
14 *Press*, 989 F.2d at 1531. It seems to the court that, in order to accurately gauge this
15 effect, the comparison should not include areas which would ordinarily not be available
16 to a generic business enterprise regardless of the municipality’s adult entertainment
17 ordinance. *See Fantasyland Video*, 373 F. Supp. 2d at 1142 (using only the total
18 industrially and commercially zoned acreage to calculate the percentage of available
19 property in an unincorporated county). This exclusion is especially apt in the context of a
20 largely undeveloped and rural unincorporated county such as Snohomish. Accordingly,
21 in this case, the relevant comparison is between the acreage of the available adult
22 entertainment sites and the total industrial and commercial districts. Based on this

1 comparison, adult entertainment businesses have access to 7% of the total industrial and
 2 commercial acreage. This percentage is greater than the availability of 4.46% of
 3 commercial and industrial acreage that was held constitutional in *Fantasyland Video*, and
 4 was upheld by the Ninth Circuit in *Tollis*.⁹ See *Fantasyland Video*, 373 F. Supp. 2d at
 5 1142-3; *Tollis*, 505 F.3d at 942.

6 **ii. Population needs**

7 Next, the court considers “the number of sites potentially available in relation to
 8 the population [and] the incidence of adult businesses in other comparable communities.”
 9 *Young*, 216 F.3d at 821. Unincorporated Snohomish County had a population of 304,435
 10 in 2013, which results in one adult entertainment location for every 3,805 persons. (See
 11 2013 Annual Rep.) In *Fantasyland*, the court upheld a zoning ordinance in an
 12 unincorporated county that resulted in one potential adult entertainment location for

13
 14
 15 ⁹ If the “total usable land” were considered, the percent would drop to 0.11%, which is lower than
 16 the amounts approved in *City of Renton* and *Walnut Properties*. See *City of Renton*, 465 U.S. at 53
 17 (upholding an ordinance that left 520 acres and 5 % of land available); *Walnut Properties*, 808 F.3d at
 18 1337 (striking down ordinance that left 99.5 acres and 1.4% of land available). As Mr. McKibben
 19 concedes, there is no “bright line” rule governing the appropriate percentage of available land. (See Plf.
 20 Reply (Dkt. # 36) at 7.) In *Tollis*, the Ninth Circuit upheld zoning laws that reserved only 0.01% of total
 21 land available. See *Tollis*, 505 F.3d at 942 (affirming in relevant part *Fantasyland Video*, 373 F. Supp.
 22 2d at 1142 (finding 227.03 acres were available out of a total 2,286,059 acres)). The Ninth Circuit was
 not persuaded by the plaintiff’s argument that “the percentage of available acreage theoretically available
 to adult businesses in unincorporated San Diego County is drastically less than the amount approved in
Renton” because the plaintiff “offers[ed] no argument or evidence showing that these communities are
 comparable to unincorporated San Diego County in size, population, or demographics.” *Id.* The Ninth
 Circuit ruled that, “[a]bsent such a connection, [the plaintiff’s] calculations are meaningless.” See *id.*
 Here, Mr. McKibben has compiled out of district cases discussing similarly low percentages of available
 acreage, but presents no argument or evidence showing that the underlying communities are comparable
 to unincorporated Snohomish County. (See Plf. Mot. at 9-14.) In fact, Snohomish County, like the
 county at issue in *Tollis*, is a large, unincorporated county with substantial amounts of rural and
 undeveloped land. (See 2013 Annual Rep.). As such, *Tollis*, rather than Mr. McKibben’s case, would
 control.

every 6911 persons—a ratio twice as high.¹⁰ *See Fantasyland*, 373 F. Supp. 2d at 1142-43. In review, the Ninth Circuit noted: “The unincorporated portions of the county take up the substantial majority of the land area but only a small fraction of the population of the county as a whole. It may fairly be presumed that most of the commercial property in the county, including property suitable for adult businesses, is located within municipal boundaries and thus outside the territory governed by the ordinance in question.” *Tollis*, 505 F.3d at 942. As such, “at least where we are dealing with ‘unincorporated’ areas, it is appropriate to recognize the likely availability of other locations within the same economic market in neighboring municipalities.” *Id.* Here, as in *Tollis*, unincorporated Snohomish County comprises over 90% of the land area but less than half the population of Snohomish County. (*See* Garrelts Rep. at 9 (incorporated land statistics); 2013 Annual Rep. (population statistics).) As such, when considering the number of sites available in relation to the population, it is appropriate to recognize the likely availability of other locations within the same economic market in neighboring municipalities. *See Tollis*, 505 F.3d at 942.

iii. Supply and demand

“[M]easuring whether the number of proposed sites is sufficient to meet existing demand for sexual or pornographic speech is one of several tools to assess whether a municipality has afforded an adult business a reasonable opportunity to conduct their trade.” *Tollis*, 505 F.3d at 942. After all, “data regarding the number of sites available

¹⁰ In fact, in *Fantasyland*, only 8-10 adult entertainment locations could operate simultaneously, so a maximum ratio of operating adult entertainment venues to population could not exceed 1 for 47,000 persons. *See Fantasyland*, 373 F. Supp. 2d at 1142-43.

1 for adult use is meaningless without a contextual basis for determining whether that
 2 number is sufficient for that particular locale.” *Young*, 216 F.3d at 822.

3 Here, it is undisputed that only one adult entertainment dance studio has operated
 4 in unincorporated Snohomish County within the past 30 years. (Lubrin Decl. ¶ 8.)
 5 Namely, the venue “Honey’s” operated from 1994 until it was closed in 2012. (*Id.*) It is
 6 also undisputed that, since the zoning ordinances were enacted in 1994, Snohomish
 7 County has received only two applications for adult cabarets, both of which occurred in
 8 2011. (*Id.* ¶ 8, Ex. B, Ex. C.) Drawing all inferences in Mr. McKibben’s favor, it
 9 appears that there has been demand to operate at most three adult cabarets in the County
 10 at one time.¹¹

11 In *Young*, the Ninth Circuit found that a city ordinance that provided four possible
 12 simultaneous sites for adult entertainment businesses was constitutional because only one
 13 person had ever applied for an adult business permit and “there was no evidence that
 14 more than four adult businesses would be opened . . . even in the absence of any adult use
 15 zoning regulations.” *Young*, 216 F.3d at 822. Similarly, in *Diamond*, the Ninth Circuit
 16 held that a town ordinance that provided the sole entity seeking to open an adult

17
 18 ¹¹ Citing *Isbell v. City of San Diego*, 450 F. Supp. 2d 1143, 1152 (S.D. Cal. 2006), Mr. McKibben
 19 argues that the County has not adequately shown demand because it has not provided evidence regarding
 20 the number of unofficial inquiries into opening an adult cabaret that it received over the last 20 years. Mr.
 21 McKibben’s reliance on *Isbell* is misplaced for two reasons. First, *Isbell* concerned a municipality that
 22 only provided the court information regarding the more expensive of the two tiers of licensing
 applications it offered. *Id.* In contrast, the County’s application fee of \$350.00 is less expensive than
 both the \$2300.00 and \$500.00 options offered in *Isbell*, and hence less prohibitive. (*See* 2d. Olson Decl.
 (Dkt. # 37) ¶ 2, Exs. 1, 2.) Second, Mr. McKibben has provided no evidence that the County maintained
 any system of tracking the free “over the counter” inquiries it may have received over the years, or,
 alternatively, that it was on notice that it should have tracked those inquiries. *See id.* Therefore, the
 court finds that the County has presented adequate evidence regarding demand.

1 entertainment business with seven possible location sites was constitutional. *See*
2 *Diamond*, 215 F.3d at 1058. Finally, in *Tollis*, two adult entertainment businesses were
3 currently operation when the Ninth Circuit upheld an ordinance that permitted only eight
4 adult entertainment businesses to operate simultaneously on 68 parcels available in
5 unincorporated San Diego County. *See Tollis*, 505 F.3d at 942 (affirming in relevant part
6 *Fantasyland Video*, 373 F. Supp. 2d at 1141)).

7 Here, the 80 sites available in unincorporated Snohomish County exceed the
8 maximum potential demand for 3 adult entertainment businesses by at least three times
9 the margins approved by the Ninth Circuit in *Young* and *Diamond*. Although *Young* and
10 *Diamond* involved smaller municipalities than the County, *Tollis* affirms the applicability
11 of the supply and demand test to large, undeveloped unincorporated counties such as
12 Snohomish County.

13 The Ninth Circuit has cautioned that it must not be assumed that an ordinance
14 “will be automatically constitutional if demand does not exceed the supply of sites,
15 because such a conclusion is insufficient to account for the chilling effect that an adult
16 use zoning ordinance may have on prospective business owners.” *Isbell*, 258 F.3d at
17 1114 (quoting *Young*, at 822.) Here, however, the excess supply of 80 sites could
18 lawfully absorb the theoretical demand associated with chilling effects of even a
19 substantial magnitude. Moreover, there is no evidence that substantially more than three
20 adult businesses would be opened in the absence of any adult use zoning regulations. *See*
21 *Young*, 216 F.3d at 822. To the contrary, the fact that during the 12 years preceding the
22 zoning ordinance the demand for adult cabarets was for only zero to one venue suggests

1 that the magnitude of any chilling effect is low. (Lubrin Decl. ¶¶ 8-9 (“Honey[’s] is the
2 only strip club that has operated in unincorporated Snohomish Couty within the past 30
3 years.”) As such, the supply of sites available under the zoning regulations more than
4 satisfies the maximum demonstrated demand for adult entertainment venues. *See Young*,
5 216 F.3d at 822; *Diamond*, 215 F.3d at 1058.

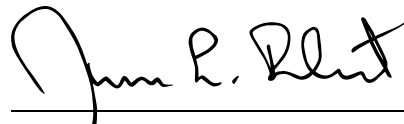
6 **iv. Summary**

7 Taking into consideration the history of scant demand for adult entertainment
8 licenses relative to the number of available sites and their acreage, as well as the
9 population and character of the unincorporated area, the court finds the County has met
10 its burden on summary judgment to show that the number of sites available to adult
11 entertainment dance studios under the zoning regulations is sufficient to provide
12 reasonable alternative avenues of communication. *See Young*, 216 F.3d at 821.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the court DENIES Mr. McKibben’s motion for
15 summary judgment (Dkt. # 20) and GRANTS the County’s motion for summary
16 judgment (Dkt. # 23).

17 Dated this 5th day of December, 2014.

18
19 

20 JAMES L. ROBART
21 United States District Judge
22